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OCT 4 1956
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IN THE

Supreme Court of the United States

OCTOBER TERM—1956

No 1.

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER ON REHEARING

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ACKERMAN PRESS, Phones BO 9-7107-8

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We believe that the Petition of Petitioner for Rehearing and the Brief for Respondent on Rehearing have clarified the issue to that which the District Court decided, but which the Court of Appeals failed to mention or treat of namely, that of *mistake* as ground for holding a seaman's release for personal injuries invalid.

This issue has on this appeal two aspects, viz.:

(1) Whether *mistake* of the character found by the District Court herein justifies a District Court holding a seaman's release invalid; and

(2) Whether after a District Court holds a seaman's release invalid for *mistake,* the District Court's decision may be reversed without proof and affirmative holding that there was no *mistake* and that the District Court's finding of *mistake* was "clearly erroneous."

The first involves application of the principles of *Garrett* v. *Moore McCormack Co. Inc.,* 1942, 317 U. S. 239, which holds that the burden of proof rests on Respondent

to establish that a seaman's release was fairly arrived at and made by the seaman with full understanding of his rights and for adequate consideration.

The second involves in addition the application of Rule 52 (a), Federal Rules of Civil Procedure, and *McAllister* v. *United States,* 1954, 348 U. S. 19, 20, which holds that:

> "the Court of Appeals may not set aside the judgment below unless it is clearly erroneous" (348 U. S. 20).

Notwithstanding the simplicity of this issue; indeed, lest the real and simple issue be misapprehended, in view of Respondent's prior arguments herein, the Court of Appeals' decision below, and this Court's previous summary decision by equally divided Court, the case, we believe, is one wherein it is peculiarly appropriate that the Court make *before* decision "that intensive study attendant upon opinion writing" usually deferred until after the decisional vote (Cf. *Rice* v. *Sioux City Memorial Park Cemetery,* 1955, 349 U. S. 70, 75).

If Respondent, in its Brief for Respondent on Rehearing (p. 2) seeks now to imply that the reversal by the Court of Appeals was based on holding the District Court's finding "clearly erroneous", we respectfully refer to the decisions in the two lower Courts as showing the contrary. The District Court treated of and found *mistake,* relied on by plaintiff; the Court of Appeals treated of "an absence of *coercion*" relied on by defendant.

We interpret the Brief for Respondent on Rehearing as finally accepting as the issues that of "*mistake*" relied on by the District Court, and that of whether the District Court's findings of "mistake" and of invalidity resulting therefrom were "clearly erroneous".

While this represents a radical shift from Respondent's previous arguments in both appellate Courts, we welcome it as the only just course, and as eliminating "The greatest

difficulty encountered by Petitioner's counsel in the Court of Appeals and here", viz., to focus attention of the appellate Courts upon the issue of *mistake* determined by the District Court (See Petition of Petitioner for Rehearing, p. 7).

We feel justified in pointing out, however, that inasmuch as this was not the basis for the reversal obtained by Respondent below, the case in one where, for greater reason even than in *McAllister* v. *United States, supra,* this Court stands "In relation to the District Court's findings . . . in the same position as the Court of Appeals" (348 U. S. 20, 21). It is, indeed, as though Respondent were appellant here from the District Court's determination; asserting here, for the first time in either appellate court, that the District Court's findings of "mistake" and resulting invalidity are "clearing erroneous".

Under *Garrett* v. *Moore McCormack Co. Inc., supra,* this case is not to be reviewed as one wherein the seaman undertook, and has the burden, to "set aside" the release; but as one wherein Petitioner is emphatically a ward, and wherein Respondent undertook, and has the burden, to prove the validity of the release of the seaman-ward (317 U. S. 248).

The State Court *Garrett* decision in 344 Pa. 69, 23 A. 2d 503, which this Court reversed in 317 U. S. 239, was decided by a Pennsylvania Court, influenced by the Pennsylvania theory against "setting aside" releases. The volume containing the decision of the Court of Appeals herein, 221 F. 2d, at page ix shows that the five judges who voted against rehearing after three voted to reverse are all from Pennslyvania*; and we submit that the reasoning in the

* Judges Kalodner, Goodrich and Hastie, who reversed, and Judges Maris and Staley, who joined them in denying rehearing, are all listed as from Pennsylvania. Chief Judge Biggs and Judge McLaughlin, who dissented, are from Delaware and New Jersey (221 F. 2d, p. ix).

majority opinion employs the Pennsylvania concept of "setting aside" a release instead of really applying the law laid down by this Court in 317 U. S. 239.

The Court of Appeals' majority states that "settlement presupposes a *joint* approximation of the future". But "*joint*" approximation presupposes persons of equal standing before the law, and capable of making a binding "joint" approximation; whereas a "ward" has not this standing and capacity.

In this connection, we respectfully call the Court's attention to the contention in the Petition for Writ of Certiorari herein (p. 10) that the Court of Appeals' decision deviates from and constitutes a threat to the whole guardianship theory respecting seamen and in effect imposes upon injured seamen more harsh rules than those now applied to cases involving releases executed by injured land employees and even by injured passengers and person injured in automobile accidents, including business executives.

For brevity, we do not repeat, but respectfully refer the Court to the citations on page 12 of the Petition and the summaries thereof (pp. 14-19 of the Petition).

The great dissent of Mr. Justice Harlan in *Robertson* v. *Baldwin,* 1897, 165 U. S. 275, 288, 299, maintaining that seamen were within the Thirteenth Amendment, accepted with the majority the guardianship theory, but emphasized that "the necessity for the *protection* of seamen against those who take advantage of them" is inconsistent with making their helpless condition "the excuse for imposing upon them burdens that could not be imposed upon other classes" (165 U. S. 299).

The Brief for Respondent on Rehearing inquires (p. 3) where is there any evidence of mistaken representation or mistaken prognosis. We might more appropriately inquire

where is there any evidence to sustain the Respondent's burden of proving the validity of this seaman's release?

But Respondent's contention that there was no evidence of mistake is (1) contrary to facts found and stated by all eight Judges below (District Judge Hartshorne, and the seven judges of the Third Circuit Court of Appeals); and (2) contrary to the record, including testimony of defendant's own witnesses.

District Court Findings

The District Court opinion states that the facts therein stated shall be considered the findings of fact (Petition for Writ of Certiorari Appendix, p. 25a). It includes the following findings:

> ". . . the testimony clearly indicates the major cause of his neuropsychiatric condition to have been the fractures of his skull by the meat cleaver in the hands of Medina" (*Id.*, p. 16a).
>
> ". . . Meanwhile, Barron, or another agent of the defendant, had had Thompson examined by their Dr. Farr, who reported that Thompson then, in May 1950, would be able to return to work in three months, and had but a 10% permanent disability. This was in fact somewhat similar to the prognosis then made by the hospital itself, which was for a 'good' recovery, and that he would be fit for duty May 29th. But that both Dr. Farr and the hospital were incorrect in their prognosis as to the length and amount of Thompson's mental and neuropsychiatric disability appears quite clear. For instance, not three months, but a year, later, we find him again confined in the Stapleton Hospital, where, among the treatment of other disconnected conditions, we find he had a 'neuropsychiatric consultation', and a year after that, at the New Orleans Hospital, he was diagnosed, among other conditions, as having a

'schizophrenic reaction'. Finally now, three and one-half years after Dr. Farr's examination, Thompson is still receiving out-patient treatment at the Stapleton Marine Hospital, where they recently gave him a head X-ray, obviously in order to ascertain any objective basis for his neuropsychiatric complaints. While the X-ray was negative, Dr. Farr himself admits these complaints are real, not sham. Furthermore, the undisputed testimony shows that Thompson can not serve in his old position as cook, since the heat of the stove so seriously affects the pains in his head, and that he now is acting as a utility or mess man. Not only is this a job of lower rating than cook, but it of course carries substantially lower pay.

"In any event, at Thompson's settlement conferences with Barron, the latter, or defendant's other agent, told Thompson of this prognosis of Dr. Farr, now found to be incorrect, and Barron refused to consider any greater settlement figure than $4,000.00 because he insisted to Thompson that Thompson was practically well then. Barron admits that if he had then known that Dr. Farr's prognosis was incorrect and that Thompson's future would be as serious as it has now turned out to be, he would not have evaluated his case at $4,000.00, but would have told Thompson to get a lawyer before he settled. Barron also told Thompson he thought he had a weak case on liability. For at that time the case of Keen v. Overseas Tankship Corp. (2 Cir. 1952), 194 F. 2d 515, cert. den. 343 U. S. 966, had not been decided, and Barron thought that notice to defendant of Medina's alleged vicious character, a difficult thing to prove, was essential, in order to impose liability on the owner of the ship. But it is clear that this is not the law, and that a seaman can recover if hurt by unseaworthy personnel, in the same way that he can if he is hurt by unseaworthy material, and quite regardless of the ship owner's notice or negligence" (*Id.*, pp. 16a-17a).

". . . In short, it would appear that, as to this matter of Thompson's neuropsychiatric syndrome, or anxiety complex, admittedly real, but a difficult thing at best to either diagnose or prognose, both Dr. Farr and the Stapleton Hospital were much mistaken as to its future effects and continued existence. Had defendant not advised Thompson of Dr. Farr's report or insisted that it was right, and that he was practically a well man, that would have been one thing. . . . But here, to the contrary, not only did Thompson not have the aid of any legal and medical advices of his own, but the defendant, which did have that aid, insisted that its advices were correct, and in essence urged Thompson to settle for an amount now shown to be clearly inadequate, when it turns out that defendant's representations to Thompson as to his condition were, in fact, incorrect. Thus this seaman, in the same inferior position as a ward in dealing with his guardian, was induced to settle for an inadequate sum by the incorrect representations of the other party, in a superior position to him. Such a settlement certainly is not 'fairly arrived at' " (*Id.*, pp. 22a-23a).

Court of Appeals Similar Findings

Respondent stated in its Brief in Opposition (p. 2) filed when the writ was applied for, respecting the Court of Appeals recitation of the facts:

"That Court then applied the facts, as determined by the District Court . . . The Third Circuit Court of Appeals made no new determination of the facts. It took the facts as determined by the District Court, but arrived at a different conclusion of law . . ."

The Court of Appeals opinion of reversal (Petition for Writ of Certiorari Appendix, pp. 6a-12a) does indeed recite:

"Since the signing of the release plaintiff has continued to suffer from the effects of the head blow, having been hospitalized at New Orleans from November 13, 1952, to December 15, 1952, and at Stapleton from February 16, 1954 to February 23, 1954. In fact, Thompson is still receiving out-patient treatment.

"While he has procured work at levels of remuneration and status above and below that which he commanded prior to the assault, it is patent that his injuries have proved more serious than was thought at the time of the release" (*Id.*, p. 8a).

". . . True, the plaintiff is now known to have suffered to a greater extent than was previously thought" (*Id.*, p. 9a).

". . . It is true that the plaintiff did not have independent medical advice of his choosing.

". . . Thompson had been told the success of his case was dependent upon a showing that the defendants had or should have had notice that Medina's presence created a risk of danger to the crew" (*Id.*, p. 10a).

The two dissenting Judges recited:

". . . In this case the negotiator for the shipowner, Barron, told Thompson that Thompson had 'a weak case' both as to measure of damages and the law. As a matter of fact Thompson had suffered more serious injury than his, Thompson's, doctor had realized and Barron's statement to Thompson was probably innocent though it worked damage to Thompson's cause. Thompson is a Negro with but slight formal education, who had suffered a severe head injury and had developed psychoses. DX2 indicates that about the time he executed the release he was in a confused state of mind. As the opinion of this Court reveals, Barron premised his statement that Thompson had a weak

case on the law on the asserted conclusion that he could recover from the shipowner only because of the shipowner's negligence and not on the theory that the ship was unseaworthy because of the vicious propensities of the member of the crew who had attacked Thompson.

"This was not a correct statement of the law even as it existed at the time the release was executed. . . .* Quite apart from history and niceties of language, Barron's statement as to the status of the law was incorrect and if he did not know this he should have for no decided case lay against Thompson.

"Barron's conduct was subject to the inference, which the Court below in effect drew, that he was trying to procure a release from an ignorant and confused seaman on terms most favorable for his client, the shipowner. Barron made use of the sort of language which claim adjustors are accustomed to use when dealing with a claimant with whom they are entitled to negotiate at arm's length" (*Id.*, pp. 1a-3a).

The foregoing facts recited in the opinions of both Courts are such as to sustain the District Court's finding of mistake and resulting invalidity of the release, against any contention that such findings are clearly erroneous.

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* Act of 1898, 46 U. S. C. § 653, "Complaint that vessel is unseaworthy", provides that crew may apply to the Court for a survey where the vessel is believed to be "unfit in her *crew*, body, tackle, apparel, furniture, provisions, or stores" for an intended voyage. In *The Rolph*, 9 Cir., 1924, 299 Fed. 52, cert. denied *Rolph Navigation & Coal Co.* v. *Kohilas*, 266 U. S. 614, assault by vicious mate on seaman, beating his eyes with a knotted rope until blinded; held vessel unseaworthy under doctrine of *The Southwark*, 1903, 191 U. S. 1. This had been the law before and since 1828. See *McLanahan* v. *Universal Insurance Company*, 1 Pet. (26 U. S.) 170, 183-184.

Some of the Evidence of Mistake

As recited in number 6 of the Questions Presented in the Petition for Writ of Certiorari (p. 4) the record shows that two Marine Hospital records (Galveston 3/25/50, 4/1/50; Stapleton 4/9/50-4/28/50 (R. 318a, 319a)) show "Encephalopathy due to trauma."

Dr. Somberg, a specialist in neurological surgery (R. 120a) and consultant neuro-surgeon at the Stapleton Hospital (R. 121a) testified that encephalopathy indicated brain damage (R. 132a) "means disease of the brain" (R. 131a); and that plaintiff's fractured skull gave rise to organic brain disease as the result of which plaintiff had an anxiety state bordering on the schizophrenic (R. 124a), and that this was caused by this assault (R. 128a). Schizophrenia involved "the broad loss of contact with reality" (R. 152a). The pains, manifesting themselves almost or quite continuously, are very apt to continue throughout plaintiff's life (R. 130a). Prognosis is "poor" (R. 132a). Plaintiff "had a substantial *injury to the brain*"; and Dr. Somberg's "present prognosis" is that "there is an *organic disease of the brain*",* which was caused "by the blows that were rained upon him that day" (R. 134a). "On gross organic examination" plaintiff would appear all right (R. 136a); and when a patient with encephalopathy due to trauma, which little or nothing can be done for, enters the hospital with a duodenal ulcer, the hospital tackles "those parts of the total picture that you can do something for" and the failure of some records to mention the headaches did not mean that they were not present or that the hospital was not aware of them (R. 154a, 155a).

Defendant's Dr. Farr, who was a general surgeon but *not* a neurologist, which involved a highly specialized field (R. 166a), testified that he made an examination of Petitioner in May 1950 to help defendant price the value of the case (R. 165a). He was not sure he saw at that time the hospital record showing encephalopathy due to trauma (R.

167a). He concluded Petitioner had a fractured skull and very considerable nervous shock,* and prescribed three months convalescence period and a 10% permanent disability (R. 158a, 159a). In allowing 10% permanent disability

> "I was allowing really for nervous shock, more than anything else, nervous shock* and, well, memory of what he had been through" (R. 159a).

He testified that opinions differed whether X-rays taken for him the week preceding trial indicated a still existing fracture; he thought not, "but the man who took the pictures for me said *there is still* a faint line of a vertical fracture" (R. 162a).

To inquiry by the Court, he testified: "No, I don't think he is faking, . . . and I think the same symptoms are renewed" (R. 164a).

The claim agent, Barron, testified (R. 264a-265a):

> "Q. Did you discuss this encephalopathy with him?
> A. No, I don't believe I did.
> Q. You had access at that time to the hospital records?
> A. I just had the clinical abstract, not the hospital records.
> Q. And the clinical abstract, does that have anything of the Marine Hospital at Stapleton, Staten Island?
> A. Yes, it does.
> Q. And right there in bold type is encephalopathy due to trauma. That's right, isn't it?
> A. Yes.
> Q. And that we know is not just concussion, is it?
> A. It is not just concussion, no.
> Q. It is brain damage?
> A. By terminology, yes" (R. 264a-265a).

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* Note the difference between Dr. Farr's allowance for "nervous shock" and Dr. Somberg's prognosis of "injury to the brain" and "organic disease of the brain."

He also testified as respects plaintiff's "weak case":

"Q. And as his Honor has just asked you, you communicated that to him, at least that your thoughts were that he had a weak case. Is that right, sir?

A. Yes" (R. 264a).

But he told him Dr. Farr's prognosis, testifying (R. 260a):

"Q. Even at the second meeting did you have any discussion with respect to Dr. Farr's report with Thompson himself?

A. Yes, I did. Well, as I remember it, Dr. Farr found he had a 10 per cent permanent disability of his body and I made that known to Mr. Thompson."

He further testified:

"The Witness: I would have been mistaken if Dr. Farr's prognosis was wrong. My evaluation would have been other than it was.

Q. Your evaluation of the case and the amount that should be paid.

A. And of the consideration, yes" (R. 271a).

"Q. It certainly was not in your mind that this gentleman about two years ago would have to give up being a sea cook, or a cook of any kind, was it?

A. No, it was not.

Q. You expected him to be able to go on or go to sea as a cook or second cook and draw the salary that such a worker gets, is that right, sir?

A. That is right.

Q. Now, of course, if you could have looked forward to the fact that this gentleman was not going to be able to do that but would have to give up cooking at sea because his head would not let him, the pain in his head, and the flashes that came on near the hot stove, would not allow him to go on, you would not have evaluated the case as you did, would you?

A. No, sir, if I thought it was the direct result of injuries sustained on that ship, no" (R. 272a, 273a).

"Q. As a matter of fact, Mr. Barron, you wouldn't have allowed him to take the four thousand dollars, would you?

A. If I could foresee the future and those were the facts" (R. 274a).

"Q. Was the question of notice of the man's vicious propensities necessary in your understanding of the law existing at that time to—

A. It was" (R. 275a).

"The Court: Doesn't it come to this: the understanding of the profession and of you as to the law at the time that you conferred with counsel now turns out to be wrong. You told Thompson wrong innocently, also as it now turns out depending upon how the Court looks at the facts as to the injury, you took Dr. Farr's word, or report, and you told Thompson that he was in a much less serious condition than he now may possibly be, and if that possibility is correct, you, therefore, told Thompson wrong as to the medical fact innocently, is that correct?

The Witness: That is true.

The Court: Therefore, innocently Thompson instead of getting advice from his own side only got advice from the defendant's side which though innocent was wrong. Is that right?

The Witness: It is possible, your Honor. Of course I don't know what advice he got on the outside" (R. 276a-277a).

Mr. Mahoney, the company representative with whom petitioner first talked, did not testify. Petitioner testified (R. 106a) that Mr. Mahoney told him:

" 'Mr. Thompson, the best we can do between the moneys we gave you and what we are about to offer

you will be about four thousand dollars and that is the best we can do *because you are well.*'

The Court: Is that what he said?

The Witness: That is what Mr. Mahoney said.

Q. *Because you were well.*

A. *Because I am well.*" (Italics ours.)

This testimony is wholly undisputed. Plaintiff further testified (R. 108a):

"I said to him, 'That is the best you can do?'

And he said, 'Well, it's not me, it's the insurance people.'

And I said, 'I would like to see that man.'

And he said, 'You will, because you got to go to him to sign your release.'

But now I want to tell you this: if I knew then like I know now, I was suffering then like I am now, I wouldn't have signed no release for nobody; I would have died before I would have done it" (R. 108a).

Plaintiff further testified (R. 110a):

"Well, I didn't have no choice, I signed the release but I didn't know I was going to be sick like this.

Q. You didn't have a lawyer, did you?

A. I had no lawyer, I was depending on *them.*

Q. You didn't have a bit of legal advice from the time you were struck by Medina, struck down on that ship, until you took the money and signed your name to the paper. You never had a lawyer explain to you your rights, did you?

A. Just what Mahoney and this insurance man said to me. They were the only two I spoke to." (Italics ours.)

Conclusions

As the foregoing and a review of the record will disclose:

1. Respondent completely failed to sustain its burden of proving that the seaman fully understood his rights, the extent of his injury, the amount of his damages, the validity of his claim, the value of his claim; or that the seaman had correct medical and legal advice, or that the consideration was adequate (*Garrett* v. *Moore McCormack Co. Inc., supra*).

2. The Respondent completely failed to prove the validity of the release.

3. The proof, both of plaintiff and of defendant, on the contrary, establishes that the Petitioner did *not* fully understand his rights, the extent of his injury, the amount of his damages, the validity of his claim, or the value of his claim; and that Petitioner did *not* have correct legal advice, but was erroneously advised by Respondent; that he did *not* have correct medical advice, nor was there even mentioned or explained to him encephalopathy due to trauma; and that the consideration was *not* adequate in view of his real injuries, damage and legal rights of recovery.

4. The Court of Appeals did not hold and would not have been justified in holding that the District Court's determination of mistake and resulting invalidity of the release was clearly erroneous.

5. The District Judge very carefully handled the case throughout, with complete fairness to both parties; and there was no justification for the Court of Appeals revers-

ing the District Court's judgment (*McAllister* v. *U. S., supra,* 348 U. S. 19).

Respectfully submitted,

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* Examination of Record at following points will show questions by the District Judge to witness Thompson: 56a, 57a, 58a, 59a, 60a, 63a, 64a, 65a, 66a, 67a, 68a, 69a, 73a, 74a, 75a, 77a, 79a, 80a, 82a, 83a, 84a, 85a, 86a, 87a, 88a, 89a, 90a, 93a, 95a, 96a, 99a, 100a, 103a, 104a, 105a, 107a, 111a, 112a, 119a, 181a, 182a, 183a, 184a, 185a, 188a, 189a, 190a, 191a, 193a, 194a, see 197a, 198a, 204a, 205a, 206a, 207a, 209a, 210a, 211a, 237a, 239a.

Witness Barron: 258a, 264a, 269a, 270a, 271a, 276a, 278a, 279a.

Witness Dr. Sonberg: 128a, 134a, 139a, 141a, 152a.

Witness Dr. Farr: 158a, 162a, 163a, 164a, 165a, 168a, 169a, 170a, 171a, 174a, 175a, 176a, 177a, 178a.